IN THE SUPREME COURT OF THE STATE OF ALASKA

Yvonne Ito, Appellant, v. Copper River Native Association, Appellee.	)	Supreme Court No. S-17965

Trial Court Case No. 3AN-20-06229CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANHORAGE
THE HONORABLE DANI CROSBY, PRESIDING

REPLY BRIEF OF APPELLANT

NORTHERN JUSTICE PROJECT, LLC
Attorneys for Appellant

By: /s/ James J. Davis, Jr.
James J. Davis, Jr., AK Bar No. 9412140
NORTHERN JUSTICE PROJECT, LLC
406 G Street, Suite 207
Anchorage, AK 99501
(907) 308-3395 (telephone)
(866) 813-8645 (fax)
Email: jdavis@njp-law.com

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AS 10.20.051. Members and liability of directors, officers, employees, and members.

(a) A corporation may have one or more classes of members or may have no members. If the corporation has one or more classes of members, the designation of the class or classes, the manner of election or appointment, and the qualifications and rights of the members of each class shall be set out in the articles of incorporation or the bylaws. If the corporation has no members, that fact shall be set out in the articles of incorporation or the bylaws. A corporation may issue certificates evidencing membership.

(b) The directors, officers, employees, and members of the corporation are not, as such, liable on its obligations.

25 U.S.C. § 5381. Definitions

…(b) Indian tribe. In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this title, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term "Indian tribe" as used in this title shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

25 U.S.C. § 5332 Sovereign immunity and trusteeship rights unaffected

Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

25 U.S.C. § 5396. Application of other sections of the Act

(a) Mandatory application. All provisions of sections 5(b), 6, 7, 102(c) and (d), 104, 105(k) and (l), 106(a) through (k), and 111 of this Act and section 314 of Public Law 101-512 (coverage under chapter 171 of title 28, United States Code, commonly known as the "Federal Tort Claims Act"), to the extent not in conflict with this title, shall apply to compacts and funding agreements authorized by this title.

(b) Discretionary application. At the request of a participating Indian tribe, any other provision of title I, to the extent such provision is not in conflict with this title, shall be made a part of a funding agreement or compact entered into under this title. The Secretary is obligated to include such provision at the option of the participating Indian tribe or tribes. If such provision is incorporated it shall have the same force and effect as if it were set out in full in this title. In the event an Indian tribe requests such incorporation at the negotiation stage of a compact or funding agreement, such incorporation shall be deemed effective immediately and shall control the negotiation and resulting compact and funding agreement.

INTRODUCTION

As the United States Supreme Court reiterated in June 2021, when it comes to the law and America's indigenous people, "Alaska is often the exception, not the rule."[1] One example of Alaska's uniqueness is its many regional Native corporations, like the Copper River Native Association ("CRNA"), Association of Village Council Presidents ("AVCP"), or Tanana Chiefs Conference ("TCC"). These corporations have no parallel in the United States: they arose "following enaction of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq*. (ANCSA), because it was necessary for Alaskan native villages or tribes to form a native regional corporation to receive certain benefits under ANCSA."[2] Since all of these Native corporations are uniquely Alaskan, the cases from outside Alaska, cited by CRNA and amici, are of very limited utility.[3]

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[1] *Yellen v. Confederated Tribes of the Chehalis Reservation*, 594 U.S. ___, 2021 U.S. LEXIS 3400, at *6 (June 25, 2021) (citing numerous cases).

[2] *Eaglesun Sys. Prods. v. Ass'n of Vill. Council Presidents*, No. 13-CV-0438-CVE-PJC, 2014 U.S. Dist. LEXIS 36659, at *2 (N.D. Okla. Mar. 20, 2014*); see also City of Ketchikan v. Cape Fox Corp.,* 85 F.3d 1381, 1383 (9th Cir. 1996) (ANCSA "divides Alaska into 12 geographic regions, each with a Native Regional Corporation").

[3] While CRNA and amici claim CRNA is a "tribal consortia," whereby tribes ostensibly banded together to address healthcare (see, e.g., Appellee's Br. at 8), CRNA was actually established in 1972 as a state corporation [Exc. 34] as a result of ANCSA. The term "tribal consortia" was not used until years later, when Congress enacted the Tribal Self-Governance Amendment of 2000, which added Title V of the Indian Self- Determination and Education Assistance Act.

These unique Alaska corporations are often funded by federal or state monies,[4] and provide a range of services to Alaska's Native peoples. For example, TCC, an amici, "has five major divisions: Administration and Finance, Planning and Development, Health Services, Native Services, and Subregional/Village Programs."[5] As another example, Cook Inlet Tribal Council provides child care, job training, and drug and alcohol counseling.[6] Or, Yvonne Ito, the appellant in this case, provided senior services for CRNA.[7] Or, in *Runyon*, the case much at issue in this appeal, the program administered by AVCP was Head Start.[8]

In *Runyon*, in an opinion by Chief Justice Fabe, this Court held that these corporations are not automatically entitled to sovereign immunity.[9] This Court reached that decision without fixating on whether the corporations had been set

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4 *See, e.g., Fairbanks N. Star Borough v. Dena' Nena' Henash*, 88 P.3d 124, 127 (Alaska 2004) ("TCC's programs are funded largely through its contracts with the federal and state governments"); *Runyon v. Ass'n of Village Council Presidents*, 84 P.3d 437, 438 (Alaska 2004) (noting AVCP received state and federal funds).

5 *Fairbanks N. Star Borough*, 88 P.3d at 127.

6 *See* Cook Inlet Tribal Council's "What We Do," https://citci.org/about/what-we-do/ (last visited July 11, 2021).

7 Appellee's Br. at 3.

8 Beyond Head Start, AVCP operated "a wide range" of programs "to benefit the member tribes," like TANF, juvenile programs, vocational rehabilitation, elder programs, public safety initiatives, and more. *Runyon*, 84 P.3d at 438.

9 *Id.* at 440.

up by or for tribes, or whether they did great work for tribes, or whether they received federal or state monies that might have otherwise gone to tribes, or even whether they received funds under the federal 93-638 Program.[10]

Instead, in determining if a tribe's sovereign immunity could pass to a corporation, *Runyon* focused on a threshold factor of "paramount importance": the "financial relationship" between the corporation and the tribe.[11] Per *Runyon*, if a tribe would not be legally responsible for a corporation's obligations, then the corporation is not entitled to sovereign immunity.[12]

Runyon makes sense. These corporations employ thousands of Alaskans and blanket immunity would stop all of these employees from having any meaningful legal redress against these corporations for any wrongdoing.[13] And even the United States loses its sovereign immunity when it functions through corporations instead of through its sovereign form.[14] Meanwhile, CRNA and the

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10 *Id.*

11 *Id.*

12 *Id.* at 441.

13 These corporations do not waive their purported immunity vis à vis their employees. *See e.g.,* Appellee's Br. at 14-15 (acknowledging that CRNA "does not waive immunity in employment contracts.")

14 *Somerlott v. Cherokee Nation Distribs.*, 686 F.3d 1144, 1150 (10th Cir. 2012) (citing *Panama R. Co. v. Curran*, 256 F. 768, 771-72 (5th Cir. 1919)); *see also Bank of the United States v. Planters' Bank of Ga.*, 22 U.S. 904, 907-908 (1824); *Salas v. United States*, 234 F. 842, 844-45 (2d Cir. 1916).

amici provide no data that even suggests that the *Runyon* rule has led to any problem or issues with any of Alaska's Native corporations.

But, CRNA and the amici now want this Court to overrule *Runyon*, and to create blanket sovereign immunity for most of all of Alaska's Native corporations.[15] They claim that *Runyon* is not in "harmony with federal law on this issue," and has been "rejected by the federal courts and widely criticized."[16]

CRNA is wrong. Most courts agree with this Court: state corporations, even if set up by or for tribes, are *not* tribes and are *not* cloaked with tribal sovereignty. Second, the "issue" before this Court is quintessentially Alaskan, i.e., are Native corporations – which arose due to ANCSA and are organized under Alaska state law – now entitled to sovereign immunity?

So CRNA and the amici make an alternative argument that, even if this Court refuses to reverse *Runyon*, it should create a new carve out: if any Native corporation receives any federal money through the PL 93-638 program, it should automatically gain complete sovereign immunity.[17]

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[15] Including some of Alaska's largest corporations, like Artic Slope Regional Corporation or Cook Inlet Regional Corporation, so long as these corporations were set up by member tribes, or benefit tribes, or receive any P.L. 93-638 funds, or as long as any judgment against them would indirectly impact tribe finances.

[16] Appellee's Br. at 30-31.

[17] *Id.* at 15-21.

The problem with this alternative argument, though, is that this Court would be the first to condone it. Not one case has ever held this. And this is for good reason: nothing in PL 93-638 says anything of the sort. Not only that, this carve out would conflict with *Runyon*, where a Native corporation *did* receive federal money through the PL 63-638 program and still was *not* automatically awarded sovereign immunity by this Court.

Because *Runyon* is good law that the trial court effectively ignored, and because being a recipient of PL 93-638 monies is not enough to give an entity blanket immunity, this Court should now reverse the trial court.

ARGUMENT

A. CRNA Does Not Have Sovereign Immunity Under *Runyon*.

Runyon concerned whether a tribe's sovereign immunity can pass to a separate corporation. It held that, "[w]hether the entity is formed by one tribe or several, it takes on tribal sovereign immunity only if the tribe or tribes, the sources of sovereign authority and privilege, are the real parties in interest."[18]

Runyon noted that an entity may assume a tribe's sovereign immunity if a tribe "would be legally responsible for" an entity's obligations.[19] However, *Runyon* also held that a tribe is unlikely to be a real party in interest if a

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18 *Runyon*, 84 P.3d at 440.

19 *Id.* at 441.

judgment against an entity "will not reach the tribe's assets or if it lacks the power to bind or obligate the funds of the tribe."[20]

Here, CRNA is a corporation under Alaska law, and is distinct from its member tribes. [Exc. 34] As a non-profit corporation, CRNA's member tribes are not liable on its obligations and cannot be responsible for a judgment against it.[21] Thus, under *Runyon*, CRNA does not have sovereign immunity.

However, the trial court and CRNA have tried to reformulate *Runyon* where, if an entity receives federal funds that a tribe might otherwise benefit from, the entity should gain sovereign immunity. Yet this is what *Runyon* rejected.[22] And as a practical matter, a judgment against a Native corporation can always interfere with federal or state funds that would otherwise benefit a tribe. Under the trial court's analysis, all such corporations would always be immune under *Runyon*, and *Runyon* would be meaningless.

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[20] *Id.* at 440-41.

[21] AS 10.20.051(b) ("The directors, officers, employees, and members of the [nonprofit] corporation are not, as such, liable on its obligations"); *Runyon*, 84 P.3d at 440 (holding that the entity at issue, AVCP, was a nonprofit corporation, that its member tribes would not be liable for its obligations per AS 10.20.051(b), and that it was thus not entitled to their sovereign immunity).

[22] *Runyon*, 84 P.3d at 438-441. *Runyon* explicitly noted that the entity at issue, AVCP, received federal funds and administered social service programs; *Runyon* also focused on the safety of a tribe's assets from a judgment, not on any indirect "financial interests" emphasized by CRNA or the trial court. *See id.*

B. Because Of This Court's Fidelity To Stare Decisis, CRNA Tries To Rewrite *Runyon*.

Given the problems posed by *Runyon* and stare decisis, CRNA also seeks sovereign immunity by trying to rewrite a new *Runyon* test that cannot be reconciled with the actual decision. In support, CRNA notes that it receives P.L. 93-638 funds to carry out programs for tribes, and it cites to Judge Holland's decision in *Matyascik v. Arctic Slope Native Ass'n, Ltd.*[23] to argue that this funding arrangement should bestow it with sovereign immunity under *Runyon*.[24]

However, Judge Holland explicitly rejected *Runyon*, and he explicitly noted that he was, instead, bound to follow the 9th Circuit's *White* case.[25] CRNA is trying to rewrite *Runyon* by citing a case that rejected it.

Furthermore, again, the fact that a corporation receives P.L. 93-638 money that might have otherwise gone to a tribe, does not convert the

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[23] No. 2:19-CV-0002-HRH, 2019 WL 3554687 (D. Alaska Aug. 5, 2019).

[24] Appellee's Br. at 27-29.

[25] *Matyascik,* 2019 WL 3554687, at *11 ("The court declines to follow *Runyon*, as plaintiff urges, and make financial insulation a dispositive factor.") (following *White v. Univ. of California*, 765 F.3d (9th Cir. 2014)).

corporation into a sovereign under *Runyon*. After all, the Native corporation in *Runyon* also received P.L. 93-638 money.[26] That did not render it a sovereign.

Regardless, even ignoring the above, *Runyon* and *Matyascik* cannot be reconciled. While *Matyascik* considered whether a judgment against an entity might "adversely affect" tribes in any way, *Runyon* straightforwardly considered whether a tribe's assets would be safe from judgment.[27] Thus, while both cases analyzed the financial relationships between tribes and other entities, they analyzed these relationships in completely different – and conflicting – ways.

C. This Court Is Not Bound To Defer To Federal Courts.

CRNA also hints that this Court must abandon *Runyon* and instead defer to the 9th Circuit's analysis of whether an entity is entitled to a tribe's sovereign immunity.[28] CRNA argues that to do otherwise is an impermissible diminution of federal law,[29] and it cites to *Douglas Indian Ass'n and Bay Mills Indian Cmty.*[30]

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26 CRNA concedes this. See Appellee's Br. at 29 and fn. 112.

27 *Matyascik,* 2019 WL 3554687, at *11-12.

28 Appellee's Br. at 21.

29 *Id.*

30 *Id.* (citing *Douglas Indian Ass'n v. Cent Council of Tlingit & Haida Indian Tribes of Alaska,* 403 P.3d 1172, 1176 (Alaska 2017) (quoting *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 788 (2014))).

This is another misreading of the law. For one, while CRNA claims that *Douglas Indian Ass'n* forces this Court to defer to the 9th Circuit on substantive law about sovereign immunity, the decision was actually about procedural law.[31]

Moreover, our federalist system includes both federal and state courts, and there may sometimes be two different rules of law depending on which court parties are in. It is not a "diminution" of immunity for a state court to analyze immunity one way, and for a federal court to analyze it a different way, especially when there is not on-point precent from the United States Supreme Court. Contrary to CRNA's upset, this is neither shocking nor anomalous; it is normal.

For example, in *Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) the federal courts held that tribal custody orders *were* subject to full faith and credit. But in *Native Vill. of Nenana v. Dep't of Health & Soc. Servs.*,[32] this Court held the opposite.

Most recently, in *TransUnion LLC v. Ramirez*,[33] the United States Supreme Court held that consumers who may have been harmed by false credit

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[31] *Douglas Indian Ass'n v. Cent Council of Tlingit & Haida Indian Tribes of Alaska,* 403 P.3d 1172, 1176 (Alaska 2017).

[32] 722 P.2d 219 (Alaska 1986).

[33] 594 U.S. ____, 2021 U.S. LEXIS 3401 (June 25, 2021).

reports did not have the sort of injuries that were cognizable in federal court.[34] But, as, Justice Thomas pointed out in his dissent, this only means that the same injured consumers will bring their exact same cases in state court.[35]

Although CRNA disagrees with the premise, "the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme Court."[36] This well-settled rule means that this Court need not follow Judge Holland or the 9th Circuit when considering whether Alaska Native corporations and/or P.L. 93-638 funding recipients should have sovereign immunity.

And, while CRNA decries "unseemly and destructive" races to the courthouse,[37] nothing like this will happen. When an employee is a victim of a

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34 *Id.* at *40-41.

35 *Id.* (Thomas, J., dissenting) (slip op., at 18) ("Today's decision might actually be a pyrrhic victory for TransUnion. The Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. That combination may leave state courts—which are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law—as the sole forum for such cases, with defendants unable to seek removal to federal court. By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions.") (citations and quotation marks omitted).

36 *In re F.P.*, 843 P.2d 1214, 1215 n.1 (Alaska 1992).

37 Appellee's Br. at 34.

breach of the implied covenant of good faith and fair dealing, as was Ms. Ito, she will file in state court. There will be no race by anyone else to any courthouse.

D. CRNA's Discussion Of Federal Common Law Also Ignores That CRNA Is Not A Tribe And Federal Law On Tribes Would Not Control Legal Questions Concerning State Corporations.

CRNA's reliance on federal cases is not only wrong for the reasons above, but also because the cases that it relies on are not on-point. For example, while it is correct that "tribal immunity … is not subject to diminution by the States,"[38] that is not what is happening. Instead, this Court is deciding if and when a state corporation, not a tribe, should be given sovereign immunity.

Last, CRNA is wrong in its analysis of the various federal cases. Where, as here, there is a state corporation involved, many federal courts hold that that the corporation is *not* entitled to sovereign immunity. For example, in *Somerlott v. Cherokee Nation Distribs.*,[39] the 10th Circuit held that sovereign immunity did not protect a corporation organized by the Cherokee Nation under Oklahoma law. The same result was reached by the Arizona Supreme Court in *Dixon v. Picopa Constr. Co.*[40]

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38 *Id.* at 33.

39 686 F.3d 1144 (10th Cir. 2012).

40 772 P.2d 1104 (1989); *see also Eaglesun*, 2014 U.S. Dist. LEXIS 36659, at *16-17 ("Even though Alaska Native corporations or regional associations are recognized as tribes for limited purposes, no court has ever found that

The logic of these cases is not mysterious. As the 10th Circuit explained:

> This approach is consistent with the traditional treatment of the sovereign immunity of the United States. While tribal sovereign immunity is not coextensive with that of the states, *Kiowa Tribe*, 523 U.S. at 756, "[t]ribal sovereign immunity *is* deemed to be coextensive with the sovereign immunity of the United States." *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007) (emphasis added). In that context, courts have held the United States' sovereign immunity does not extend to its sub-entities incorporated as distinct legal entities under state law. For example, when the United States formed and became the sole shareholder of the Panama Railroad Company, a New York corporation, courts held the corporation was distinct from the United States and did not share its immunity. *See Panama R. Co. v. Curran*, 256 F. 768, 771-72 (5th Cir. 1919) (citing *Bank of the United States v. Planters' Bank of Ga.*, 22 U.S. 904, 907-908, 6 L. Ed. 244 (1824)); *Salas v. United States*, 234 F. 842, 844-45 (2d Cir. 1916) ("When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation."). The court can identify no reason to depart from this principle here. Accordingly, CND, a separate legal entity organized under the laws of another sovereign, Oklahoma, cannot share in the Nation's immunity from suit . . . .[41]

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these corporations or associations possess sovereign immunity from suit, because they do not possess key attributes of an independent and self-governing Indian tribe"); *Aleman v. Chugach Support Services, Inc.*, 485 F.3d 206, 213 (4th Cir. 2007) ("While the sovereign immunity of Indian tribes is a necessary corollary to Indian sovereignty and self- governance, Alaska Native Corporations and their subsidiaries are not comparable sovereign entities.") (internal quotation marks and ellipses omitted); *Seldovia Native Ass'n, Inc. v. Lujan,* 904 F.2d 1335, 1350-51 (9th Cir. 1990) (Alaska Native Village corporations are not governing bodies and they do 'not meet one of the basic criteria of an Indian tribe'); *see also, Namekagon Dev. Co. v. Bois Forte Reservation Housing Auth.*, 395 F.Supp. 23, 26-27 (D.Minn.1974) (analogizing Indian corporations to corporations created by the United States government and suggesting in dicta that corporate status implies a waiver of immunity), *judgment aff'd*, 517 F.2d 508 (8th Cir.1975).

41 *Somerlott*, 686 F.3d at 1150.

E. Federal Statutes Do Not Give CRNA Sovereign Immunity.[42]

Aside from *Runyon*, CRNA alternatively argues that it has sovereign immunity under federal statutes, namely per 25 U.S.C. § 5381(b) of the Indian Self-Determination and Education Assistance Act ("ISDEAA").[43] There are many problems with this argument.

First, the cases cited by CRNA do not support CRNA's reading of 25 U.S.C. § 5381(b). No cases holds that, if tribes authorize a state corporation to carry out their functions under § 5381(b) and receive P.L. 93-638 monies, the state corporation is automatically cloaked with sovereign immunity. This absence of any supporting case law is telling.[44]

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[42] CRNA claims that Ito waived her arguments about P.L. 93-638. However, CRNA made no arguments about 25 U.S.C. § 5381(b) until it filed its reply brief in the trial court. [Exc. 196] CRNA's opening brief in the trial court made only passing references to the ISDEAA. Having sandbagged Ito and waited until its reply brief to raise its P.L. 93-638 argument, CRNA cannot claim that Ito waived her right to respond to these arguments.

[43] Appellee's Br. at 15-21.

[44] CRNA cites *Pink v. Modoc* as a purported "two decades" old example of its argument about 25 U.S.C. § 5381(b). Appellee's Br. at 15-16 and n. 67 (citing *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1188-89 (9th Cir. 1998)). However, that case failed to even mention 25 U.S.C. §5381(b), and it certainly did not confer sovereign immunity on an entity based on the provision or on the ISDEAA as a whole. As another example, CRNA cites a trial court's decision in *Wilson v. Alaska Native Tribal Health Consortium,* 399 F. Supp. 3d 926, 932-33 (D. Alaska 2019). However, the trial judge in that case analyzed sovereign immunity according to other factors, not §5381(b).

Second, the statutory language of 25 U.S.C. § 5381(b) does not say what CRNA suggests. It only states:

> In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this title, the authorized Indian tribe, inter-tribal consortium, or tribalorganization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this title). In such event, the term "Indian tribe" as used in this title shall include such otherauthorized Indian tribe, inter-tribal consortium, or tribalorganization.

This language nowhere mentions that a state corporation like CRNA, even if created by and for its member tribes, will have sovereign immunity.[45]

Third, the "rights and responsibilities" mentioned in 25 U.S.C. § 5381(b) reference the rights provided to tribes under the statute that contains 25 U.S.C. § 5381(b), i.e., Title V of the ISDEAA, not *all* rights. If Congress wanted to enshrine a significant expansion of sovereign immunity to new entities via statute, it would know how to do so, and to do so clearly.

Fourth, there is the legislative history. CRNA suggests that legislative reports called for 25 U.S.C. § 5381(b) to confer sovereign immunity on new

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[45] CRNA tells this Court that the "rights and responsibilities" in 25 U.S.C. § 5381(b) means sovereign immunity. But sovereign immunity is neither a right nor a responsibility: it is a legal defense. *See, e.g., News & Observer Publ'g Co. v. McCrory*, 795 S.E.2d 243, 247 (2016); *Goad v. Cuyahoga Cty. Bd. of Comm'rs*, 607 N.E.2d 878, 879 (1992); *Morrison v. Budget Rent a Car Sys.*, 230 A.D.2d 253, 262 (N.Y. App. Div. 1997).

entities.[46] However, like with its textual argument, CRNA never offers up any instance of legislators commenting on sovereign immunity in such a context.[47] This matches reality. Indeed, to the contrary, the legislative commentary about 25 U.S.C. § 5381(b) never mentioned sovereign immunity, and it focused on the provision allowing entities like CRNA to participate in Title V of the ISDEAA, not on a broad conferral of all rights.[48] CRNA never explains how any legislative history would corroborate its claims that 25 U.S.C. § 5381(b) was intended to extend far beyond the statute that it is relevant to.

Fifth, CRNA improperly relies on ISDEAA provisions aside from 25 U.S.C. § 5381(b) to support its claim for immunity. For example, it emphasizes 25 U.S.C. § 5332.[49] Yet that provision calls for the opposite; it explicitly notes not only that the ISDEAA shall not diminish or impair sovereign immunity, but

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46 Appellee's Br. at 18-19.

47 *Id.*.

48 H.R. Rep. No. 106-477, at 19 (1999) ("This definition enables an Indian tribe to authorize another Indian tribe, inter-tribal consortium or tribal organization to participate in self-governance on its behalf. The authorized Indian tribe, inter-tribal consortium or tribal organization may exercise the authorizing Indian tribe's rights as specified by tribal resolution."); S. Rep. No. 106-221, at 7 (2000) (explaining the reason for the same provision in S. 979).

49 Appellee's Br. at 19-20.

that it shall not even affect or modify such immunity.[50] CRNA never explains how this provision, which was reaffirmed by Congress when it amended the ISDEAA[51] – and which broadly limits the ISDEAA's effect on sovereign immunity – should instead bestow sovereign immunity on entirely new entities. Such an argument belies the plain language of 25 U.S.C. § 5332, as well as the broader statute that it references.

Relatedly, CRNA also points to 25 U.S.C. § 5321(g) as supporting its assertion of tribal immunity. But again, CRNA's analysis is incomplete. While CRNA is correct that this provision requires the ISDEAA to be liberally construed to benefit tribes,[52] it glosses over how there must be a statutory basis to liberally construe in the first place. For example, if the ISDEAA did provide for the conferral of sovereign immunity in certain instances, it might comport with 25 U.S.C. § 5321(g) to liberally construe when those instances arise.

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[50] 25 U.S.C. § 5332 ("Nothing in this chapter shall be construed as (1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or (2)authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.").

[51] 25 U.S.C. § 5396 (Congress codified this provision when adding Title V to the ISDEAA, and the provision reiterated that 25 U.S.C. § 5332 would apply to all compacts and funding agreements authorized under Title V).

[52] Appellee's Br. at 20.

However, even the most liberal of liberal constructions should not be wielded to create new immunities that lack a statutory basis to begin with.

F. CRNA Has Failed To Carry Its Burden of Showing Why *Runyon* Should be Reversed.

This Court has made it very clear: "the importance of stare decisis cannot be overstated."[53] As this Court noted earlier this year, "the stare decisis doctrine rests on a solid bedrock of practicality: 'no judicial system could do society's work if it eyed each issue afresh in every case that raised it.'"[54] To paraphrase *Ahtna,* because this case is not distinguishable from *Runyon*, and because it is addressing the same issues, this court should reverse the superior court.

This Court is not inflexible. Where a litigant clearly proves to this Court that its original decision was erroneous, stare decisis gives way. So too when a litigant clearly proves to this Court that its original decision is no longer sound. So too when a litigant clearly proves to this Court that more good than harm will result from abandoning stare decisis.[55]

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[53] *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 495 (Alaska 2020).

[54] Ahtna, Inc. v. State, Dep't of Nat. Res., No. S-17496/17526/17605, 2021 Alas. LEXIS 26, at *10 (Mar. 12, 2021).

[55] *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 495 (Alaska 2020) ("A party seeking reversal bears the heavy threshold burden of showing compelling reasons for reconsidering the prior ruling. We will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer

But CRNA has proven none of these things. This Court's original decision in *Runyon* balanced various competing concerns and held that, as long as a tribe's assets were not subject to an adverse judgement against a related corporation, it would be inappropriate to bestow the tribe's absolute immunity on that corporation. The cases cited above show that, far from being anomalous, this rule is followed by the other states around the country.[56] Nothing about this Court's *Runyon* decision was clearly erroneous.

And CRNA has done nothing to show that more good than harm will result from expanding absolute immunity to all Native corporations, all non-profit Native corporations, or all Native corporations that receive any P.L. 93-638 funds. In fact, the cases cited by CRNA show the mischief and misconduct that results when and where absolute immunity exists.[57] And, while the amici assure this Court that granting absolute immunity to CRNA in this case will not open the door to similar claims being made by all Native corporations, all non-profit

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sound because of changed conditions and that more good than harm would result from a departure from precedent.") (internal citations and quotations omitted).

[56] *See supra* n.40

[57] *See e.g., Franke v. Alaska Native Tribal Health Consortium*, 399 F. Supp. 3d 926 (D. Alaska 2019) (one of Alaska's leading lawyers was hired to be the Chief Ethics officer of ANHTC. She brought systemic Medicaid fraud claims to Andy Teuber, the then CEO of ANHTC. She was summarily fired. Judge Holland found that her claims were completely barred by sovereign immunity).

Native corporations, or all Native corporations that receive any P.L. 93-638, this Court is wise enough to know that is precisely what will occur.

NORTHERN JUSTICE PROJECT, LLC
Attorneys for Appellant

Date: 7/14/21

By: /s/ James J. Davis, Jr.
James J. Davis, Jr., AK Bar No. 9412140

CERTIFICATE REQUIRED BY APPELLATE RULE 513.5(C)(2)

Undersigned counsel certifies that the typeface used in this brief is 13- point (proportionally spaced) Century Schoolbook.

Date: 7/14/2021 By: /s/ James J. Davis, Jr.
James J. Davis, Jr., AK Bar No. 9412140